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No. 412

# In the Supreme Court of the United States

OCTOBER TERM, 1961

ANGELO INCISO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 292 F. 2d 374.

### JURISDICTION

The judgment of the court of appeals was entered on June 30, 1961 (Pet. App. 14a), and a motion for rehearing was denied on August 17, 1961 (Pet. App. 15a). The petition for a writ of certiorari was filed on September 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the trial court properly received in evidence, as being falsely exculpatory, petitioner's testimony before a Senate committee that monthly

payments remitted by employers to his union as employees' insurance premiums were for union dues.

2. Whether it was improper for the United States Attorney to state in closing argument that petitioner "lied" in making such exculpatory statements.

3. Whether separate receipts of money by a representative of employees from different employers, in violation of 29 U.S.C. 186, constitute separate offenses for which consecutive sentences may be imposed.

4. Whether petitioner was properly convicted of violating the Taft-Hartley Act by causing a representative of employees to receive money from employers.

## STATUTES INVOLVED

Section 186 of Title 29 of the United States Code provides in pertinent part:

* * * * *

> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> (c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in

compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents: * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Section 2 of Title 18 of the United States Code provides as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on all counts of a twenty-two count indictment charging violations of the Taft-Hartley Act (I R. 4–6, 406).[1] He was sentenced to imprisonment for one year on each count, the sentences on the first ten counts to be consecutive and on the remaining counts to be concurrent with the sentence on count 10, or a total of ten years. The court also imposed fines of $1,000 on each count, aggregating $22,000 (I R. 408). The court of appeals unanimously affirmed (Pet. App. 1a–13a).

Each count of the indictment charged that Amalgamated Local 286 of the Industrial Workers of America was a representative of employees of an industry affecting interstate commerce and that petitioner, as an officer of the local, caused it to receive a stated sum from a named employer, in violation of 29 U.S.C. 186(b). The total amount of money alleged by the various counts to have been received was $420,267.76 (I R. 4–6; Pet. App. 3a).

The evidence was uncontradicted that the employers named were all engaged in industries affecting interstate commerce. Also, there was no dispute that

[1] Appellant's appendix, appellee's appendix and an exhibit volume are herein referred to as "I R.", "II R." and "III R.", respectively.

Local 286 received the payments as alleged. There was no evidence that the payments fell within any of the exceptions named in the statute: (1) compensation for services rendered, (2) satisfaction of any court judgments, (3) sales in the regular course of business, (4) sums deducted from wages for union dues, or (5) payments into a trust fund for the exclusive benefit of employees or their dependents. There had been a claim by petitioner when he testified earlier before the Senate Subcommittee on Welfare and Pension Funds that the payments were union dues, but this contention was not renewed at the trial, except for a passing remark by counsel.[2] Petitioner's position was that there was "no sufficient showing here upon which to submit this case to the jury either on the question of willfulness or of scienter, or that he caused the acts in this indictment to be done by this union" (I R. 330).

1. The evidence showed that petitioner controlled Local 286. He was its president, except for a period of about fifteen months beginning in 1952 when Albert De Vito filled the office. Petitioner placed De Vito in office without an election, directed his actions and controlled the policy of the union, and then resumed the office himself, telling De Vito

[2] In support of one of his questions, petitioner's counsel said (I R. 35): "[I]t is our theory, if your Honor please, that all these moneys were deducted as dues, and when wage increases were inaugurated here, they were given so that the company could make these expenditures in connection with the purchase of this insurance." This theory was never further urged, either in the motion for judgment of acquittal (I R. 330) or in closing argument (II R. 7-20).

to take up his old position of business representative (I R. 287–289, 249). The local had no treasurer, and petitioner signed all checks (I R. 309).

In 1951, petitioner told De Vito that it was necessary under the Taft-Hartley Act that any money received for employees' insurance should go into a trust fund set up by agreement between employers and the union (I R. 276–279). Accordingly, letters were sent out to various employers enclosing a proposed trust agreement for employees' insurance. Then the matter was dropped and never further discussed (III R. 26, 90–100; I R. 121, 279).

For a time, the employers insured their employees with a private insurance company, but this was supplanted by an arrangement whereby a fixed sum was remitted monthly to the union for each employee, to be used for health and accident insurance (I R. 26, 65–66, 143).[3] Petitioner urged this change of system and gave as reason therefor that by purchasing a policy on a large group he could get better coverage than the individual employers could obtain (I R. 26, 49, 55, 73, 91–93, 102–103, 136, 163, 215). One employer testified that petitioner told him that he had an interest in the company through which the union insured (I R. 185). Another employer who at first refused to make his insurance payments to the union was confronted with a series of one-day strikes, which were called in the middle of a morning, to last the balance of the day.

[3] Originally the amount remitted was $5.15 for each employee insured, but this was later raised to $6.15 (I R. 27, 59, 61, 284). There was also payments for dependents' insurance, the amount of which varied with the number of dependents involved.

This continued daily until the employer acceded to petitioner's demand that insurance payments be made directly to the union (I R. 78–79, III R. 9–16).

The payments were regularly sent to the union by the employers with letters of transmittal and check-off lists which showed the names of the employees and the deductions from their pay of $3.00 for union dues and either $5.15 or $6.15 for individual insurance, plus payments for dependents (III R. 6–8, 23, 25, 29, 32, 39–40, 42, 51, 56, 63, 65, 71, 72, 77, 83–84, 87, 104; I R. 108, 137, 201, 241–242). In several instances petitioner asked the employer to prepare one check covering both dues and insurance (I R. 42, 98, 153).

When a check-off list was received, petitioner's secretary would see that it coincided with the amount of the accompanying check. The duplicate of the list would be forwarded to the insurance company, together with the union's check for the insurance premium, in an amount equal to $5.15 per employee, less 4% (approximately $4.94). The difference between that amount and $6.15 would remain in the union bank account (I R. 249–251, 319). Petitioner repeatedly recognized in his correspondence that these payments from the employers were for insurance.[4]

[4] Petitioner informed employers as to the amount to be remitted for insurance and dues (III R. 33, 47, 49, 53), requested that the check-off lists be in duplicate (III R. 34) and called attention to failures to make insurance deductions (III R. 78–80, 81). In one instance petitioner returned a check because it was made payable to the insurance company, rather than to the union (I R. 113). The employer prepared a letter replying that it was illegal to make such payments directly to

2. Senator Paul Douglas, chairman of a Senate Subcommittee on Welfare and Pension Funds, testified that petitioner appeared before the committee in December 1955 and that the transcript of his testimony was accurate (I R. 227–230). Petitioner objected to the transcript on the grounds that it was not such a document as could be used to refresh the witness' recollection and because it was not properly authenticated. The court overruled the objections, stating that the document was not being used to refresh the witness' recollection and that the objection as to authentication was premature (I R. 229–230). At the conclusion of the government's case, certain portions of the transcript were offered as admissions against interest. Over petitioner's sole objection "that no proper foundation has been laid for the use of the documents for the purpose of showing these admissions, or so-called admissions," the government was allowed to read those portions to the jury (I R. 317–318, 320–329).

Petitioner testified before the committee that, as the contracts with the various companies would expire, the employers would be told that there was an increase in dues. There was no talk of the employers having anything to do with any insurance. As far as the union was concerned, the payments were "dues as such"; how the companies broke them down was their business. There was no discussion with the companies that the difference was going for

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the union, citing the statute and setting forth its penalties (III R. 18). At a bargaining session he personally gave this letter to petitioner, who read it and left it on the table (I R. 125).

insurance. One company sent in a check with the insurance company's name on it and petitioner told him it was dues, to which the employer finally agreed (I R. 320–329).

Petitioner further testified before the committee that he was bargaining with some thirty-odd employers. Sometimes they had asked why the union was raising dues and petitioner had told them that the union was going to give the employees insurance. What he said was the union's business. As far as the employers were concerned, it was dues. He had also told them that the union could get insurance cheaper and better than they could. All but one of the employers made their monthly payments by check. The union would break these down between insurance and dues. Petitioner did not get a legal opinion. He did not believe that the union was violating the law, since these payments were all dues, even though the union bought insurance with some of the money.

In closing argument, the United States Attorney said a number of times that petitioner had lied and perjured himself in this testimony before the committee (I R. 365–368).

3. Prior to sentencing, petitioner's counsel made a plea for leniency, urging that there was no evidence of corruption or of wrongdoing by the petitioner (I R. 385–386). The court stated that the pre-sentence report showed that petitioner was a director of the insurance company which carried the insurance for the union members, which petitioner admitted (I R. 391); that the amount received by the union for insurance exceeded the premiums ac-

tually paid by approximately $94,000; that various expenses were charged against the union's general fund (in which the insurance receipts had been deposited), including the costs of diamond watches, rings, liquor and other gifts, and various trips; and that a second home in California (where the union did not operate) had been purchased for petitioner with union funds, and was being offered for sale at $75,000 (I R. 390–393, 395). Petitioner did not challenge any of these figures; he stated, however, that the California home had cost only $65,000, and was for sale at $75,000 (I R. 398).

**ARGUMENT**

1. Petitioner's testimony before the Senate committee was properly admitted as a false exculpatory statement. It was not offered, as petitioner contends, for the purpose of impeachment. Its purpose was to show that petitioner, aware that he had violated the law, was trying to conceal such violations by giving a false explanation to the committee of his conduct, namely, that the payments to the union were legal because they were all for dues. The destruction, suppression or fabrication of evidence is universally recognized as tending to show consciousness of guilt. A false exculpatory statement, as the court instructed the jury (I R. 378), has independent probative force. It was thus admissible whether the defendant testified or not. *Wilson* v. *United States,* 162 U.S. 613, 620; *Commonwealth* v. *Webster,* 5 Cush. 295, 300, 316;

II Wigmore, *Evidence*, § 278 (3d ed); cf. *Ashcraft* v. *Tennessee*, 327 U.S. 274.[5]

Petitioner urges that the testimony was improperly admitted because the employers mentioned therein were not identified. The original objections made when Senator Douglas was qualifying the transcript for admission were withdrawn and its exclusion was sought solely on the basis that a "proper foundation" had not been laid. Had the objection been seasonably made that the employers referred to by petitioner when he was testifying before the committee had not been identified, an effort could have been made to identify them at the trial.

In any event, the record indicates that they included the same employers who made the payments involved in this case. Petitioner testified before the committee that all the money came in by check between the first and tenth of each month (in the same amounts as shown by the evidence at the trial), and that he dealt with more than 30 employers. He described before the committee his method of handling these monthly payments, and stated this was the general practice that covered all employers. One incident he referred to before the committee—when an employer had sent

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[5] See also *United States* v. *Bando*, 244 F. 2d 833 (C.A. 2), certiorari denied, 355 U.S. 844; *United States* v. *Farina*, 218 F. 2d 62, 63 (C.A. 2); *United States* v. *Smolin*, 182 F. 2d 782, 786 (C.A. 2); *Andrews* v. *United States*, 157 F. 2d 723 (C.A. 5), certiorari denied, 330 U.S. 821; *United States* v. *Graham*, 102 F. 2d 436, 442 (C.A. 2), certiorari denied, 307 U.S. 643; *Seeman* v. *United States*, 96 F. 2d 732 (C.A. 5), certiorari denied, 305 U.S. 620; *United States* v. *Randall*, 27 Fed. Cas. 696, 702–703.

in a monthly check payable to the insurance company, but was prevailed upon to make the check payable to the union (I R. 323)—was identical to an incident described at the trial (I R. 117–125, III R. 17–19). The jury was fully justified in inferring that the 30-odd employers referred to in petitioner's testimony before the committee included the 22 employers who made the payments upon which the conviction is based.

2. While petitioner's testimony before the Senate committee was, upon its face, exculpatory, it remained for the jury to determine whether it was false. In determining that issue it was proper for the jury to consider the testimony of officers and employees of the various companies involved, the testimony of petitioner's associates in his union local, and the significance of his letters to various employers with regard to their payments each month and the check-off lists which accompanied them. The jury also properly considered petitioner's alleged conversation in which he said that it would be necessary for insurance payments to be paid into a trust fund in order to comply with the Taft-Hartley Act, his letters to employers submitting a proposed trust agreement to cover such payments, and his conduct when he was advised by one of the employers that payment of insurance premiums by the employer to the union was forbidden by law. The prosecutor committed no impropriety when he argued to the jury that, in the light of all these circumstances, petitioner had lied before the Senate committee.

Neither the prosecutor or the court ever suggested that any unfavorable inference should be drawn from petitioner's failure to testify at the trial. The prosecutor's argument that petitioner's false testimony before the committee was an attempt to conceal his violations was no more than a fair comment on the evidence. It no more violated petitioner's right to remain silent than would the application of the statutory presumption that unexplained possession of narcotics creates an inference of knowledge of illegal importation. *Yee Hem* v. *United States*, 268 U.S. 178, 185.

3. Petitioner's contention (Pet. 32–33) that all of the payments by the different employers constituted only a single offense[6] is refuted by the language of the statute. The Act provides that, except for certain payments specifically excepted, "It shall be unlawful for any representative of any employees * * * to receive or accept, or to agree to receive or accept, from the employer * * * any money or other thing of value." The offense is to receive an illegal payment from an employer, and the payments that petitioner caused the union to receive from 22 different employers were 22 separate offenses, not just a single offense. The employers were located in different cities, their contracts with the union came up for renewal at different times, and the payments covered

[6] Before trial, however, petitioner contended that the indictment improperly joined in a single count numerous payments, each of which would constitute a separate and distinct offense (I R. 8).

a two-year period. Plainly, the numerous payments by different employers were not just a single offense.

Nor is there merit to petitioner's contention (Pet. 33–35) that, because the offenses are misdemeanors, the consecutive sentences were improper. In deciding that the sentences for ten of the separate crimes should be served consecutively, the trial judge could properly consider the evidence that the offenses were committed with knowledge that the law was being violated, and the information in the pre-sentence report that substantial portions of the funds ostensibly received for insurance premiums had been diverted to petitioner's personal purposes.

4. Petitioner's argument (Pet. 38–39) that the indictment was defective because it failed to allege that petitioner himself was a representative of employees, overlooks the fact that he was charged and convicted of causing the union to receive illegal payments. Section 2(b) of Title 18 (*supra,* p. 4) provides that one who willfully causes an act to be done which, if performed by him or another would be an offense against the United States, is punishable as a principal. The receipt of the illegal payments by the union violated 29 U.S.C. 186(b); since petitioner willfully caused the union to receive such payments, he was properly convicted as a principal.

Furthermore, petitioner was also liable as a principal under 18 U.S.C. 2(a), which imposes such liability upon one who induces or procures the commission of a crime. By causing the union to violate the law, petitioner obviously induced and procured such violation.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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